ZAHARI BIN YEOP BAAI & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Hashim Yeop A. Sani J.) May 30, 1977]
[Ipoh — Perak Criminal Appeal No. 43 of 1976]

Criminal Law and Procedure — Summary trial — Duty of court at end of prosecution case — Charge — Admission of improper evidence — Department instructions — Remarks of investigating officer — Evidence of signature of accused — Similar fact evidence — Conviction quashed — Whether retrial should be ordered.

Customs — Charge of delivering up goods liable to seizure — Abetment — Customs Act, 1967, s. 137.

This was an appeal against the conviction of the appellants for an offence under section 137(1) of the Customs Act, 1967.

Held: (1) the charge in this case was defective as the addition of the words "to wit authorised removal from Customs control" was legally incorrect, as not being a legal ingredient required by the section;

(2) the learned President in this case was misled by the consideration of a number of improper evidence, including the departmental standing instructions, the remarks of the investigating officer, evidence of the signature of the accused and similar fact evidence;

(3) on the evidence place the defence should not have been called in respect of the appellants and on all the above grounds the conviction and sentence must be set aside;

(4) the ends of justice do not require that the appellants should be put on trial again.

Cases referred to:

(1) *Public Prosecutor* v. *Chin Yoke* [1940] M.L.J. Rep. 37.
(2) *Navaratnam* v. *Public Prosecutor* [1973] 1 M.L.J.
(3) *Albakhar* v. *Public Prosecutor* [1960] M.L.J. 247, 248.
(4) *Rex* v. *Howe* 2 M.C. 109, 110.

CRIMINAL APPEAL.

Edgar Joseph Jr. for the 1st appellant.

Karpal Singh for the 2nd appellant.

M. Mahalingam (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: The first appellant was convicted by the Sessions Court, Ipoh, on April 16, 1976 for an offence under section 137(1)(a) of the Customs Act, 1967, punishable under section 137(1) of the same Act. The second appellant was convicted by the same court for abetting the first appellant which is an offence under section 139 of the same Act. The former was sentenced to one day's symbolic imprisonment plus a fine of $1,000 and the latter was sentenced to one day's symbolic imprisonment plus a fine of $750. The appeals by both appellants are against conviction and sentence.

In the charge against the first appellant it was alleged that the first appellant did on the material date and time specified in the charge "deliver up, to wit, authorised removal from Customs Control . . . goods liable to seizure", to wit, 2094.8 yards of Polyester Fancy Cloth in 65 parcels which were in excess of the quantity shown in invoice No. 1253 submitted with import declaration No. 117/1 (which showed only 910.7 yards of Polyester Fancy Cloth in 25 parcels) which quantity was said to be untrue. The abetment charge against the second appellant followed closely the wording of the charge against the first appellant.

I have read and re-read the notes of evidence and the grounds of judgment of the learned President and after considering the evidence tendered on behalf of the prosecution at the close of the prosecution case and applying the rule as restated in *Public Prosecutor* v. *Chin Yoke*[1] it is my considered opinion that the defence should not have been called in the first place in respect of both the appellants. The rule is simply this. In a summary trial if the court is satisfied that, if unrebutted, the evidence adduced at the close of the prosecution case would warrant the accused's conviction, then a *prima facie* case is said to have been made out. In such a case the accused should be called upon to state his defence. If however, after weighing all the evidence adduced at the close of the prosecution case the court is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then it is said that no *prima facie* case has been made out against the accused and the accused should not be called upon for his defence.

There are numerous grounds of appeal set out in the petitions of appeal on behalf of the appellants but for the purpose of this judgment it would be sufficient for me to deal only with certain basic issues which I have observed as either not raised at any stage of the trial or raised but not sufficiently dealt with in the grounds of judgment. As the charge against the second appellant was merely consequential to the charge against the first appellant I will confine the issues only in relation to the appeal by the first appellant. My judgment on these issues will as a matter of course affect also the position of the second appellant.

Firstly, the charge. For convenience I will deal with the issues relating to the charge under the following classifications:—

(1) At the commencement of the trial in the court below counsel for the first appellant raised a preliminary objection on the charge on the grounds that the word "collusive" was not included in the charge and therefore the charge was not in accordance with the requirement of section 137 (1)(a) of the Customs Act, 1967. The learned President overruled this objection, and in my view quite correctly, as the words of that section clearly distinguish between the making of a "collusive seizure" and the act of "delivering up" which create respectively distinct and separate offences under paragraph (a) of that subsection. However during submission by counsel another point relating to the charge was also raised but which was not adequately dealt with in the grounds of judgment. This was the addition of the words "authorised removal from Customs Control" appearing in the charge purporting to describe the words "did deliver up" appearing in the charge.

In my view in the context of section 137(1)(a) of the Act the words "delivers up" can carry no more than the physical meaning. This construction is especially so as what makes it an offence under that section is the delivering up of "goods liable to seizure." The scope of section 137(1) would seem to be indicated also by the words at the beginning of that subsection which are "If any officer of customs or other persons duly

employed for the prevention of smuggling." Although the duties of an officer of customs are wider than merely to prevent smuggling, only a person "employed for the prevention of smuggling" may be charged under that section. By virtue of section 114(1) of the Customs Act, 1967 goods become "goods liable to seizure" where there has been, or there is, reasonable cause to suspect that in respect of such goods there has been committed any offence under the Act or regulations thereunder or any breach of the provisions of the Act or regulations and all such goods may be seized by any officer of customs in any place either on land or in territorial waters. The crucial words in the charge are therefore "did deliver up goods liable to seizure." It can be seen that the words "removal from customs control" can only be found in the other sections of the Act as for example section 18 relating to remission of import duty on goods lost damaged or destroyed before removal from customs control and that no abatement of duty shall be allowed after removal of goods from customs control. The words "removal from customs control" also appear in section 75 of the Act which provides that no dutiable goods shall be removed from customs control except after payment of the customs duty thereon and no removal of dutiable goods from a customs warehouse shall be allowed except under certain conditions. It is clear to my mind that section 137(1)(a) of the Act does not intend to make it an offence for authorising removal from customs control as such of any goods liable to seizure. It may be a different offence under a different provision. What is an offence under this section is the act of delivering up of goods liable to seizure. The words "to deliver" are not defined in the Customs Act, 1967 but the ordinary meaning of the words is explained in the Concise Oxford Dictionary to mean, among other things, "to rescue, to save, to set free or to hand to another, to distribute." In the context of that section therefore to deliver up goods liable to seizure can only mean to set free or to hand over to another goods in respect of which customs duties have not been paid. Thus in my view the addition of the words "to wit, authorised removal from Customs Control" to the charge was legally incorrect as not being an ingredient required by that section.

(2) Following the argument in (1) above it would seem to me the evidence adduced by the prosecution were themselves at cross purposes with the charge. There is clear evidence that the function of the first appellant on that day at the General Post Office, Ipoh, was the exercise of his duties pursuant to section 13(1) of the Customs Act, 1967 i.e. to value, weigh, measure or otherwise examine, or may cause to be valued, weighed, measured or otherwise examined any dutiable or uncustomed goods for the purpose of ascertaining the customs duty leviable thereon. If the evidence of PW2 (Superintendent of Customs Charern Interchat) who did his own investigation on behalf of the Department of Customs and of the other witnesses who testified as to the handwriting of the first appellant (Customs Officers PW5 and PW6 about whom I will deal later) were to be accepted there is still no evidence that the goods in question were delivered up by the first appellant at that point of time. It transpired in evidence that the documents went through the first appellant to the second appellant and the payment of duties were made to the postal clerk (PW5) who then released the goods in question. The question then is at what stage were the goods released from customs control? Whose duty was it to collect the duties in respect of the goods? Was PW5 when he collected the duties on the goods acting as an agent of the government or as an agent of the Customs Department? Looking through the notes of evidence and the grounds of judgment none of these points was raised or answered and as a result no finding was made. In fact the notes of evidence would tend to show startling revelations on the question of purported authorisation by the first appellant and on the question of in whose custody, actual or legal, the parcels containing the goods were.

On the question of custody of those goods PW2 said in his evidence:

> "Parcels in the post office are in the custody of Postal Authority and not the Customs. That was the position on January 13, 1973."

Again on the question as to who has the power to actually authorise the release of the goods PW5, Abdul Majid bin Buyong, a customs officer, said at page 63 of the records:—

> "In respect of this particular transaction, the officer having the power to release the goods was the postal clerk in the postal authorities."

(3) The charge speaks of a quantity in excess of the quantity specified in Invoice No. 1253 and import declaration No. 117/1 and the quantity the subject of the charge is specified in the charge as 2094.8 yards of Polyester Fancy Cloth in 65 parcels. There is no evidence from the records that the first appellant handled or delivered the parcels. In fact it was said that it was not the duty of the first appellant to be present at the time of the delivery. There is no evidence that the first appellant knew what the contents of the parcels were or that he checked them. The quantity arrived at and specified in the charge would seem to be the quantity which was discovered by customs officer, Kan Cheok Sam (PW4), who testified that he went to the premises of textile shop Foong Fatt Hin Kee at No. 50, Leech Street, Ipoh, with three other customs officers and at the shop they discovered a bundle of wrappers and then asked one Lee Kee Chang for the receipt of duties for the bundles of textiles. The said Lee Kee Chang produced to PW4 a Declaration Form No. 117/1 and Invoice No. 1253. It was found that there were 90 parcels of textiles all of which were taken back to the Customs Office. The textiles were subsequently measured by PW2. Although the Customs Act, 1967 provides expressly in section 119 thereof that the burden of proof in any prosecution in respect of any goods seized for non-payment of duties would be on the importer, we are at the moment dealing with an

offence purported to have been committed under section 137(1)(a) of that Act. In my view for the purpose of proving an offence under that section the evidence as are available on the actual nature and quantity of the goods purported to have been delivered up is to say the least, far from satisfactory.

Secondly, on reading the grounds of judgment it is clearly seen that the learned President must have been misled by the consideration of a number of improper evidence. I would classify these evidence into the following categories:—

(1) It would seem obvious that the learned President has put too much reliance on the breaches of departmental instruction issued by the Assistant Director of Customs (PW1) which was called the East Perak Standing Instruction No. 20 regarding the Customs Procedure at the General Post Office, Ipoh. According to the evidence of PW1 he issued departmental instruction (P1) to replace former instructions of 1960 and 1962. He was not aware of the 1973 instructions and he considered P1 as adequate but did not know what the 1974 instructions were. According to this witness Import Declaration No. 117/1 was not correctly entered as there were three columns which were not filled and that these columns were very important. Without these entries in the first and second columns he said the declaration 117/1 should have been rejected. Consequently Invoice No. 1253 according to him should have also been rejected by the first appellant.

At the close of his evidence this witness made a sweeping remark on the transaction in question. He said in his evidence:

"Generally speaking, if X parcels are declared and Y parcels are released, could that be a *bona fide* mistake. It cannot be."

This remark apparently found deep impression in the mind of the learned President and he reproduced this remark in his grounds of judgment at page 134 of the records. He then concluded that it could not have been a *bona fide* mistake. He also found that the standing instruction (P1) was in force in the customs section throughout the whole of January 1973 when this transaction took place. The learned President did not indicate in his grounds the weight to be given to any breach, if any, made by any customs officer to the standing instruction (P1) even assuming that P1 was actually in force at the time of the transaction. A breach of any standing instruction for departmental use cannot amount to an offence in law. In fact in PW2's own evidence he admitted that breaches of P1 had been committed a number of times by other officers in his department. He said in his evidence at page 57 of the records:

"I have found instances where first defendant did not give instructions for examination of the parcels. Other senior officers also followed this practice prior to defendant No. 1. I questioned these officers as well. They gave all sorts of answers, including the exercise of their discretion."

Later in his evidence he also said:

In the course of my investigations, there were several senior officers who had accepted parcels with forms having the column 'No. of parcels' unfilled."

In cross-examination he admitted at page 58 of the records that he did say that there had been cases in which people had been under charged and called back to pay the difference.

I agree with the submission made on behalf of the first appellant that the learned President had fallen into the same error as did the trial court in *Navaratnam* v. *Public Prosecutor*[2] where the Federal Court observed:

"In his judgment the learned trial judge has referred to the breach of Treasury regulations by the appellant. In his view the appellant committed the breach for having kept the money in his flat and not in the prison office safe as required by the regulations. We do not know how this can have any bearing on the question of dishonest intention."

(2) From his grounds of judgment the learned President would seem also to have improperly adopted findings made by PW2 in his own investigation on behalf of the Department of Customs and the opinion of others. In the process the learned President admitted and gave favourable consideration to the findings made by PW2 on his investigation which evidence are in my view prejudicial to the appellant. PW2 in his own evidence at page 43 of the records said that he had confronted the first appellant as to why he had passed the import declaration in question when it was not fully declared. PW2 said that the first appellant "could not give an explanation." PW2 then showed the first appellant the invoice and PW2 said the first appellant could not give him "a satisfactory answer." There are many instances of similar prejudicial evidence given by PW2 which was accepted by the learned President as basis for his finding of guilt. This sort of evidence is clearly inadmissible in view of its prejudicial effect. Dealing with such statements made to a police officer which in addition was inadmissible by virtue of section 113(i) of the Criminal Procedure Code then, Rigby J. said in *Albakhar* v. *Public Prosecutor*[3]:

"Since the statement itself was inadmissible then, *a fortiori*, the words of the police officer 'He did not give a satisfactory explanation' were still more inadmissible since their only purpose and effect was necessarily and inevitably to prejudice the mind of the trial Magistrate by indicating that the appellant, when challenged by the Police Officer with possession of the plants, gave an explanation which did not satisfy the Police Officer."

It would appear from the records that in the absence of these evidence there is no other evidence sufficient to justify the decision arrived at by the learned President.

(3) Also crucial in the learned President's finding on the connection between the invoice and the import declaration in question with the first appellant was the purported signature and initial of the first appellant appearing on those documents. Evidence on this was given by PW2, PW5 and PW6. All these witnesses merrily testified that the initials were those of the first appellant. It was not stated that any of them was conversant with the handwriting of the first appellant nor did anyone of them actually see the first appellant writing on those documents. Their evidence pertaining to the initials of the first appellant on

these documents should in my view have been rejected outright unless they also testified that they were familiar with the handwriting of the first appellant or they actually saw him writing on those documents. Such evidence was clearly inadmissible as these witnesses were expressing an opinion.

(4) Evidence adduced on similar facts were equally unsatisfactory. There is little doubt that the learned President was unduly influenced by the evidence of similar facts adduced. But I have grave doubt as to the admissibility of some of these evidence. PW2 was shown one of the advice cards (P14B) in respect of one of the three previous occasions of purported release by the first appellant. At page 56 of the notes of evidence PW2 in his cross-examination said:

"The signature authorising the release of the goods was not the signature of the first defendant. I was unable to ascertain whose signature it was."

What follows in his evidence was merely his own conjecture when he said:

"The goods could not possibly have been released without the knowledge of first defendant because the officer on duty on that day was Encik Zahari and no one is authorised to release except first defendant. If first defendant were absent temporarily and someone else released the goods, that should have been discovered by the officer."

Finally, there was clearly insufficient consideration given to the evidence of the prosecution witnesses themselves on the question whether there could have been a mistake on the part of one or more of the participants of the transaction. There is an abundance of evidence by the prosecution witnesses themselves indicating the probabilities of mistake or at least of sheer inefficiency to have been committed. One fact was certain that on the day in question, i.e. January 13, 1973, it was during the Chinese festive season and there was a heavy pressure of work in the customs section of the General Post Office, Ipoh. The author of the standing instruction (PW1) admitted that during festive seasons and due to pressure of work there might be *bona fide* mistakes. PW1 also said that one of the purposes of the regulations (P1) was to avoid delay. PW2 in his evidence, despite all the remarks about the first appellant, did also admit in his evidence that on the day in question he personally knew that there was something in the region of 485 parcels to be sorted out at the General Post Office, Ipoh. He admitted that this number was "quite exceptional" as it was just before the Chinese New Year. He also admitted that in the course of his investigations he had found not only the first appellant but several other senior officers who also had made the mistake of accepting parcels with forms having certain columns unfilled. He also said in his cross-examination that mistake of this nature does occur. PW5, a customs officer, who was actually working at the General Post Office on that particular day testified that being a Saturday the importers were eager to get their goods out as soon as possible and there was a big crowd at the General Post Office that day and as a result the officers were very busy. PW7, the postal clerk on duty that day whose duty it was to release the goods testified that he had been working at the General Post Office Ipoh for a number of years and said that there were instances of mistaken release of more parcels than should have been released. He said mistake of this kind can occur due to pressure of work. He reiterated in his cross-examination that he knew of occurrences of mistakes wherein more parcels were released than should have been released. But he said he was not aware of steps taken by the Customs Department to rectify such mistakes. Apparently the learned President recognised the state of affairs prevailing at the customs section of the General Post Office on that particular day. He said in his grounds of judgment at page 137 of the records:

"Although the workload has increased at the customs section, it is not mandatory for the customs staff to deal with all the nine import declarations on the day in question. It is of utmost importance that both defendants No. 1 and No. 2 should satisfy themselves of the correctness of the particulars in the documents produced."

Again at page 138 of the records the learned President exhorted that it was the duty of the customs section to ensure correct release of the goods liable to seizure. These statements appearing in the grounds of judgment would in my view clearly and correctly reflect the mental approach adopted by the learned President in his task of finding whether the first appellant was guilty of the charge. Those statements can never in my opinion be a basis of a finding of guilt in law although they would certainly make excellent administrative instructions. He concluded after those statements that the mistake which was referred to by the witness merely related to one or two parcels and not in this case which concerns 65 parcels. With respect it is obvious that the learned President has misdirected himself here. Based on all these purported findings of fact the learned President held the prosecution had established a *prima facie* case for both the first and second appellants.

Looking at the grounds of judgment I have come to the conclusion that the learned President had failed to take into account or to give sufficient consideration to every material circumstance that was in favour of the appellant available in the evidence of the prosecution witnesses themselves. Based on all the foregoing it is my view that the conviction and sentence of both the appellants should be set aside and I so order. Accordingly the cross appeals on the inadequacy of sentence are dismissed.

The question left is whether a retrial should be ordered. On the question of retrial the approach was settled in *Rex* v. *Howe*[4] where Morrison C.J. said:

"I have grave doubt whether the power to order a re-trial is intended to be exercised in cases where the prosecution have entirely through their own fault, failed to present their case properly. If I complied with this petition, it looks to me as if I should be ordering that an acquitted person should be tried a second time, only for this reason, that the prosecution had not used all their available armoury in launching the first prosecution."

It is to be noted also that although the appellants were convicted on April 16, 1976 the trial of both the appellants commenced since October 19, 1973 and the date the offence was alleged to have been committed was January 13, 1973. Under the circumstances I am of the opinion that the ends of justice do not require that the appellants should be put on trial again. There will therefore be no order of retrial.

Order accordingly.

Solicitors: *Joseph & Son; Karpal Singh & Co.*